

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

8 DENNIS MONTGOMERY, et al., ) 3:06-CV-0056-PMP (VPC) (Base File)  
9 Plaintiff, ) 3:06-CV-0145-PMP (VPC)  
10 vs. )  
11 eTREPPID TECHNOLOGIES, LLC, et al., )  
12 Defendants. )  
13 AND RELATED CLAIMS )  
14

15 On October 12, 2007, this court entered an order granting in part and denying in part the motion  
16 of Michael Flynn for attorney's fees and costs (#296). The court determined that it would adjudicate the  
17 amount of attorney's fees and costs that Mr. Flynn sought, and it established a detailed protocol for Mr.  
18 Flynn's supplemental fee application. *Id.* After the court granted Mr. Flynn a one-week extension to  
19 file his supplemental brief, Dennis Montgomery, Brenda Montgomery and the Montgomery Family Trust  
20 ("Montgomery parties") filed an *ex parte* application for an order requiring attorney-client  
21 communications to be redacted prior to submission to the court, and attached the declaration of Kenneth  
22 M. Moscariet (#302). The court stayed its order concerning supplemental briefing of the attorney's fees  
23 to allow briefing on the Montgomery parties' *ex parte* motion (#307). Mr. Flynn filed his opposition  
24 (#306), former co-counsel of Mr. Flynn, Carla Dimare, filed a declaration in response and moved to  
25 strike the declaration of Mr. Moscariet (#311), the Montgomery parties replied and moved to strike Ms.  
26 Dimare's declaration (#316), and Mr. Flynn filed reply papers (#s 317-320).

1       The Montgomery parties contend that this fee dispute does not constitute a waiver of the  
 2 attorney-client privilege and cite *Van Asdale v. Int'l. Game Technology*, 498 F.Supp 2d 1321 (D.Nev.  
 3 2007) for this proposition:

4       Many courts apply an exception to the attorney client privilege where the  
 5 attorney and the client become adversaries in a subsequent controversy  
 6 or lawsuit. However, such exceptions are usually limited to cases where  
 7 the client has sued the attorney *or where the attorney must reveal the*  
*privileged communication in order to establish or collect a fee.* See, e.g.,  
 8 *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9<sup>th</sup> Cir. 2001) (“the privilege may  
 9 be waived by the client either implicitly, by placing privileged matters in  
 10 controversy, or explicitly, by turning over privileged documents.”); *U.S.*  
 11 *v. Ballard*, 779 F.2d 287, 292 (5<sup>th</sup> Cir. 1986) (where client waived the  
 12 privilege by suing attorney for malpractice).

13     (emphasis supplied). The Montgomery parties ignore the disjunctive portion of this sentence, which  
 14 clearly applies in this dispute: Mr. Flynn is permitted to reveal privileged communications in order to  
 15 establish his fee. In a fee dispute, the client implicitly places privileged matters at issue, but this does  
 16 not give the attorney *carte blanche* to vilify the former client and make public those communications  
 17 which obviously need not be disclosed during the systematic process of provided billing statements for  
 18 claimed attorney's fees.

19     Fee disputes between a disgruntled client and his or her attorney occur routinely in legal  
 20 proceedings in state and federal courts in this country. In instances where attorney-client privileged  
 21 communication must be revealed to provide context to the legal services performed, such disclosures,  
 22 even when made *in camera*, must be crafted very carefully to avoid disclosure of unnecessary details of  
 23 the communication. The Montgomery parties provide the declaration of Mr. Moscaret, as well as sample  
 24 billing statements of Mr. Flynn, in support of their contention that Mr. Flynn's billing statements fail  
 25 to conform to reasonable and customary practices for attorney billing statements (#302, Ex.D). The  
 26 court agrees with Mr. Moscaret's conclusion, but observes that (1) it earlier entered an order expressly  
 27 providing the protocol for Mr. Flynn's preparation of a supplemental billing statement to ameliorate  
 28 these very concerns, and (2) the court cannot discern whether Mr. Moscaret's proposed redactions found  
 in Exhibit D are warranted because they are redacted. The court will not substitute Mr. Moscaret's  
 judgment for its own.

1        In its October 12, 2007 order, the court provided detailed guidelines for the preparation of Mr.  
2 Flynn and Ms. Dimare's billing statements. However, having reviewed samples of Mr. Flynn's billing  
3 statements (#302, Ex. D), as well as the Mr. Flynn and Ms. Dimare's responses, the court now orders  
4 that the supplemental billing statements and fee application shall strictly comply with Local Rule 54-16.  
5 The court further orders that the billing entries and the task summaries comply with the letter and spirit  
6 of Rules 1.6 and 1.9 of the Nevada Rules of Professional Conduct. The fee application process is not  
7 an invitation to include prejudicial, accusatory comments about the Montgomery parties, hyperbole,  
8 personal attacks, or any other invective that has no relevance to the legal services performed. Should Mr.  
9 Flynn and Ms. Dimare ignore this order, the court will strike those entries and task summaries, as well  
10 as the time billed for those legal services. The court is keenly aware that the attorney-client relationship  
11 between client and counsel deteriorated to the point that counsel sought to withdraw, and the court is  
12 familiar with the nature of the dispute. The court's task is to undertake a careful review of the fee  
13 application, to consider the respective arguments of the parties concerning the reasonableness of the fees  
14 sought, and then make an award. To complete its work, the court must rely on the professionalism and  
15 high ethical standards of all counsel concerned, and it expects nothing less.

16        The Montgomery parties propose that to avoid prejudice that may result from the information  
17 disclosed in this fee dispute, this court should appoint a special master or refer this motion to another  
18 magistrate judge. The court rejects this proposal for three reasons. First, judges are routinely privy to  
19 derogatory or even incriminating information about parties during the course of litigation, yet they must  
20 nevertheless resolve such disputes. With the court's strong admonitions to Mr. Flynn and Ms. Dimare  
21 concerning the contents of the supplemental fee application, this issue should be resolved. Second, this  
22 court will not add an additional layer to what is already a complex, lengthy proceeding that is further  
23 complicated by the state secrets privilege and related issues. Third, to the extent the parties or counsel  
24 fear this fee dispute will prejudice the court, the parties have leave to appeal this court's orders to the  
25 District Court.

26        The court fully expects that notwithstanding acrimony that may exist between Mr. Flynn and Ms.  
27 Dimare and the Montgomery parties, they will conduct themselves with utmost professionalism, mindful  
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1 of their ethical duties to their former clients. Should they fail to do so, the court will proceed  
2 accordingly.

3 **Conclusion**

4 Based upon the foregoing and for good cause appearing, it is hereby ordered as follows:

- 5 1. The *ex parte* application for order requiring attorney-client communications to be  
redacted prior to submission to the court (#302) is **DENIED**;
- 6 2. The request to strike the declaration of Montgomery's alleged expert (#311) is **DENIED**;
- 7 3. The request to strike the declaration of Carla Dimare and request for oral argument  
(#316) are **DENIED**; and
- 8 4. The request to strike irrelevant materials (#317) is **DENIED**.
- 9 5. IT IS FURTHER ORDERED that this court's order governing Mr. Flynn and Ms.  
Dimare's motion for attorney's fees (#296) is supplemented as follows:
  - 10 a. Former counsels' supplemental billing statements shall strictly comply with  
Local Rule 54-16;
  - 11 b. Neither the billing entries, the task summaries, nor any portion of the  
supplemental fee application shall violate Rules 1.6 and 1.9 of the Nevada Rules  
of Professional Conduct, nor shall it contain prejudicial personal attacks,  
hyperbole, or any other invective that has no relevance to the legal services  
performed;
  - 12 c. Should the court conclude that the supplemental fee application violates  
Paragraph 5(b) of this order, the court will strike those entries and task  
summaries, as well as the time billed for those legal services;
  - 13 d. Mr. Flynn and Ms. Dimare shall submit their joint supplement *in camera* no later  
than **December 5, 2007**, and shall serve the supplement on counsel for the  
Montgomery parties on that same date;

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- e. The Montgomery parties have leave to file a response *in camera* no later than **December 13, 2007**, and they shall serve a copy of their response on Mr. Flynn on that same date;
  - f. Mr. Flynn and Ms. Dimare have leave to file a joint reply *in camera* no later than **December 21, 2007**, and they shall serve counsel for the Montgomery parties on that same date; and
  - g. Mr. Flynn and Ms. Dimare shall otherwise comply with the protocols outlined in this court's October 12, 2007 order (#296).

## IT IS SO ORDERED.

DATED: November 27, 2007.

Valerie P. Cooke

**UNITED STATES MAGISTRATE JUDGE**